

**PERSIN KAUR v. THE RENONG TIN
DREDGING CO. LTD.**[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock
Thye F.J.) September 18, 1967]

[K.L. — Federal Court Civil Appeal No. X. 58 of 1966]

Workmen's Compensation — Employer's liability in case of death by natural cause — Heart attack — Whether personal injury by accident — Whether occupational disease — Workmen's Compensation Ordinance, 1952, ss. 4(5) & 5.

Workmen's compensation — Commissioner — Powers of — Functions of — Workmen's Compensation Ordinance, 1952, ss. 27 & 30.

The appellant as dependant of a deceased workman claimed compensation under the Workmen's Compensation Ordinance. The arbitrator dismissed her claim. She appealed and this was again dismissed by the High Court at Ipoh, upholding the arbitrator in that the appellant failed to prove that death was by an accident "arising out" of employment.

Under section 4(5) of the Workmen's Compensation Ordinance the accident being in the course of employment it is deemed to have arisen out of employment until the contrary is proved. The onus therefore, was on employers to prove that the accident (death) did not arise out of employment. If death was due to natural cause uncontributed by his employment then the employers would not be liable and would succeed.

The expert medical evidence went to show contrary to a suggested fall in the toilet that the watchman employee died of natural cause, e.g. coronary thrombosis from appellant's own statements as to deceased complaints and symptoms at the time.

Held: (1) as death from natural cases is not personal injury by accident the employers were not liable to compensate under the Ordinance;

(2) in this case there was sufficient evidence to rebut the presumption raised by section 5 of the Ordinance.

Cases referred to:—

- (1) *Golden Hope Rubber Estate Ltd. v. Kuppusamy* [1964] M.L.J. 178.
- (2) *Wilson v. Chatterton* [1964] 1 K.B. 360; [1946] 1 All E.R. 431.
- (3) *Laximibai Abinaram v. Bombay Port Trust* A.I.R. 1954 Bom. 180, 181.

FEDERAL COURT.

Kirpal Singh Brar for the appellant.

Harry Elias for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgments of Azmi C.J. (Malaya) and Ong Hock Thye F.J. and I agree with them. I have nothing further to add except to say that there was no question of post-mortem of the dead body as it was cremated. So in the absence of post-mortem Dr. McPherson, with explicit and cogent reasoning and explanation, could only conclude that it was a heart attack and we agree with his opinion. Therefore the respondents had discharged the burden imposed on them by subsection (5) of section 4 of the Workmen's Compensation Ordinance, 1952.

A There is one other matter which I feel I must mention. The Commissioner for Labour in the enquiry having referred to the case of *Golden Hope Rubber Estate Ltd. v. Kuppusamy* ⁽¹⁾ and having said that he was not making any "findings or comments" went on to say:—

B 'I wish, however, to place on record that I agree with the applicant that this accident to the workman arose out of and in the course of his employment with the respondent.'

Isn't this a finding? In my opinion it certainly is.

C In the said case my brother Ong in his judgment had already commented on the functions of the commissioner and I will quote again his actual words (at page 180) with which the Chief Justice and I agree.

D "Before leaving this case I ought to mention that the procedure followed in this case was entirely wrong and contrary to the provisions of the Workmen's Compensation Ordinance and the Regulations thereunder. The function of the Commissioner for Labour, under section 27 of the Ordinance, is only to hold an inquiry for the purposes of settling disputed questions between workmen and employer by agreement. Where such questions cannot be settled by agreement they have to be referred to the arbitrator for his award or decision (see section 30). In this case agreement was manifestly out of the question from almost the very beginning of the proceedings, when the employer denied that the accident arose in the course of the deceased's employment. In default of agreement the Assistant Commissioner for Labour, as an administrative officer, had no jurisdiction whatsoever in proceeding any step further to undertake the judicial functions of holding an inquiry and deciding on the merits of the claim. These functions properly belong to the arbitrator. The Assistant Commissioner was thus acting *ultra vires* in making his so called 'comments' which in effect were his grounds of judgment. I trust that hereafter practice will conform to regulations 38 to 44 of the Workmen's Compensation Regulations 1953, instead of treating them as a dead letter."

F Sections 27 and 30 of the Workmen's Compensation Ordinance give certain powers to the commissioner with regard to inquiries and he should keep within the limits imposed by these sections and should refrain from exercising the functions of an arbitrator. It is hoped that commissioners under the Workmen's Compensation Ordinance will in future act in accordance with the provisions laid down by the law.

G I would dismiss the appeal with costs.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Kuala Lumpur, dismissing the appellant's appeal against the judgment of the arbitrator.

I The appellant claimed compensation under the Workmen's Compensation Ordinance as a dependant of a deceased workman. The deceased was employed by the respondents as a watchman.

The facts of the case would appear to be that one morning at about 6 o'clock the deceased went to a water closet outside his house to answer

the call of nature and about 10 minutes later, the appellant heard him cry out. She went to him and he complained to her of a pain in his chest. She helped him into the house where he collapsed and died. She further stated, however, that her husband told her that he had fallen down and knocked his chest against the drain which caused the pain.

It was conceded by the respondents that the accident occurred in the course of deceased's employment and therefore, by virtue of subsection (5) of section 4 of the Workmen's Compensation Ordinance, the accident having arisen in the course of deceased's employment shall be deemed until the contrary is proved, to have arisen out of his employment. It therefore followed that the burden was shifted upon the employers to prove the accident did not arise out of the deceased's employment.

This point, however, was not argued before the arbitrator or the judge.

Before the arbitrator both parties agreed to rely upon the evidence taken by the commissioner.

It was pointed out at that stage that the evidence of the appellant to the effect that the deceased fell down and knocked his chest against the drain was only brought out in answer to a question in cross-examination.

In any case, as I said before it is upon the respondents to prove that the accident did not arise out of the deceased's employment. In my view they would have discharged this burden if they can show that the death was due to a natural cause uncontributed by his employment. In this respect, we have only the evidence of Dr. McPherson. The doctor, however, had no opportunity of examining the deceased but he gave his opinion as an expert that the deceased, if a big man and had suddenly complained of pain in the chest, then collapsed and died soon after, then he must have died of coronary thrombosis. On the other hand it would, according to him be difficult to believe that the deceased had fallen against the concrete drain, struck his chest in falling, suffered pain and died of that fall. The doctor also gave the view that the act of moving the bowels can precipitate a heart attack on a person if the person's condition of heart can be such that any strain could precipitate such an attack. But he did not, however, think that deceased's occupation as a watchman could have contributed to the heart attack.

There is no doubt from the evidence that at the time of the incident the appellant and those who advised her then were of the view that deceased died of natural cause with the result that the deceased's body was cremated within a few hours of his death and without prior medical examination. It was also apparent that this state of affairs was in no way contri-

buted to by the employers. It was not therefore due to any fault of the employers that they were unable to produce better evidence to substantiate their case that the deceased died of natural cause or to disprove medically that the deceased's employment had in any way contributed to his death.

In the circumstances I would come to the conclusion that the respondents have discharged their burden to show that on the balance of probabilities the deceased had died of a natural cause and in no way contributed by his employment.

I would therefore dismiss the appeal.

Ong Hock Thye F.J.: Sunder Singh, a Punjabi 54 years old, was employed by the respondents as watchman of their mine godown. His duty hours were from 11 p.m. to 8 a.m. At about 6 a.m. on August 31, 1963 he told his wife, the appellant, that he was going to the latrine. Ten minutes later she heard him shouting for help. She ran out of her house and saw him rolling on the ground near the gate leading to the godown. When she came up to him he complained of a "pain in the heart . . . he felt his heart being pulled away." After being carried into his house he still complained of "pain in the chest", rose to his feet and fell to the floor. He died a few minutes later.

The appellant duly claimed compensation under section 4(1) of the Workmen's Compensation Ordinance, 1952. The sole issue referred to the arbitrator, under section 30, was whether her husband's death was an accident "arising out of" his employment, though admittedly "in the course" thereof. The arbitrator dismissed the claim and his decision was upheld on appeal by the judge who, in a short judgment, expressed his entire agreement with the arbitrator that the appellant had failed to discharge the onus which rested on her.

The main grounds of appeal are (a) that the judge erred in law in holding (as the arbitrator did) that the appellant had not discharged the onus which rested on her to prove her case; (b) that the evidence of the appellant should have been accepted in preference to that of the doctor, who had not personally examined the body nor carried out any post-mortem; and (c) that the accident, being admittedly one arising "in the course of employment," should have been held to "arise out of" that employment, by reason of the presumption raised by subsection (5) of section 4 of the Ordinance.

The first and third grounds are inseparable. The said sub-section provides that "For the purposes of this Ordinance an accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment." Since the death of the watchman

occurred in the course of his employment, the presumption raised by subsection (5) clearly entitles the appellant to succeed unless it was rebutted by evidence to the contrary. Both the arbitrator and the judge, however, had overlooked the provisions of this subsection and this oversight had extended also to counsel on both sides in the earlier proceedings. Consequently, if the decision of the arbitrator rested solely on the onus of proof, the judgment of the court below should, of course, be reversed.

The second ground of appeal, however, clearly shows that the decision involved also a finding of fact. The issue of fact was the cause of death. It was the appellant's contention that the accused "fell against the concrete drain, struck his chest in falling, suffered pain and died." It was so put to Dr. S. C. McPherson, in whose opinion this was highly improbable. The doctor had been told that "the deceased workman suddenly complained of a pain in the chest, collapsed and died soon after." His opinion, consequently, was that the deceased had died of a heart attack, technically called "coronary thrombosis," and he gave what I consider most convincing reasons based, not on conjecture, but on statements made by the appellant herself. To quote him:—

"Heart attacks can occur at any time. It is resultant from a degenerative condition of the heart and can occur in any individual without prior warning.

Any physical or emotional changes in an individual can cause a heart attack.

The act of moving the bowels can precipitate a heart attack on a person if the person's condition of heart had been such that any strain could precipitate such an attack.

I do not think that his occupation as watchman could have contributed to the heart attack.

Sudden death can result from haemorrhage of the brain. But in such cases the person concerned would not have called out. He would have in all probability been subject to paralysis.

As this particular workman started shouting after moving his bowels or while moving his bowels it can be said that he died of either a heart attack or haemorrhage of the brain. It is hard to believe that a man of his build as described could fall through his own height and suffer a heart attack.

A heart attack can come on just like that and without warning and in the absence of a post-mortem I can only conclude it was a heart attack."

This expert medical opinion was, of course, relevant, even in the absence of a post-mortem. As between the alternatives, I think plain commonsense must shy at the very suggestion that a mere fall by itself could have so injured the man's chest as to cause his sudden death. To accept a fall as the cause of death must impose an impossible strain on any one's credulity. For my own part, therefore, I have no hesitation in rejecting it, as both the arbitrator and judge appear to have done.

Death being due to a degenerative heart condition, the further question now arises whether such condition was brought about or contributed to by the deceased's employment as watchman. Even were the employment a contributory, and not the sole, cause, the employers are still liable in law: see *Wilson v. Chatterton*.⁽²⁾

Unfortunately, this question was neither raised nor considered at any stage in the earlier proceedings. It would be quite pointless, however, merely on this ground, to refer the matter back to the arbitrator for his decision, since no further useful evidence can possibly be forthcoming on either side. A decision on this point by the arbitrator or by this court must equally be a matter of inference from facts on the record.

As to the deceased's health and physical condition, the respondents' mine manager stated that the deceased had worked for his company for almost 40 years, without taking sick leave, and nobody was even aware that he had any heart complaint. This was corroborated by the appellant herself. There was, on the other hand, not a scrap of evidence that the nature of the employment was such as to impose any greater strain on the heart than, for instance, what a bank clerk or cashier would suffer from sitting at his desk. The job of a watchman is to keep watch, in the absence of further evidence that he was required to do anything more arduous than keeping awake and perambulating about the premises being guarded. In the instant case, he was not even so perambulating in the course of his duty when he strained to move his bowels in the latrine. In my judgment, therefore, there was sufficient evidence to rebut the presumption raised by section 5. Counsel for the appellant has cited *Laxmibai Abinaram v. Bombay Port Trust*⁽³⁾ in which case it was said:—

"The medical evidence clearly establishes that the deceased died on the morning of August 21, as a result of the strain caused upon his heart by the particular work that the deceased was doing, viz., having to stand on his legs and having to move about as a watchman looking after the pumping station belonging to the Port Trust. Therefore, it is clear on this evidence that the workman died as a result of an accident."

With respect, that case is no authority for the proposition that a watchman's occupation is one which imposes a strain on the heart. Whether the medical evidence there was correct or not, it was evidence relating to that particular watchman only.

I should observe that, under section 4(1)(a), the employer's liability for compensation arises only where a workman suffers "personal injury by accident". Death from natural causes is clearly not personal injury by accident. Whether a heart condition, which causes a workman to collapse and die in the course of his employment should necessarily be held, by reason of the provisions of subsection (5) of

section 4, to arise out of such employment, is a question that must be carefully considered in the circumstances of each particular case. I think there has been a tendency towards hasty reading and indiscriminating acceptance of precedents in this connection.

I sympathise with the appellant, but the respondents were not insurers under a life policy and sympathy is no ground for the grant of compensation outside the law. I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *B. Kaher & Kirpal Brar; Shearn, Delamore & Co.*

CHARLIE TAY v. PUBLIC PROSECUTOR; TONG HOE & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Buttrose J.) October 13, 1967]

[Singapore — Magistrates Appeal Nos. 225 & 226 of 1966]

Criminal Law and Procedure — Trial — Consolidation of separate cases — Joint trial court has no jurisdiction — Trial nullity — Convictions and sentences quashed — New trial ordered — Criminal Procedure Code (Cap. 132), ss. 5, 161, 162, 165, 169 & 440.

A simultaneous trial of two cases is a nullity. Where an accused person has pleaded "not guilty" to the offences charged against him, and another accused person has pleaded "not guilty" to the offence or offences charged against him in another separate and independent charge, the issues raised by these two pleas cannot be tried together.

The three appellants were charged with robbery. The first of three appellants was also charged with personating a public servant. As the latter offence was committed at the same time and during the commission of the robbery, the case of robbery against the three appellants was joined with the case of personating a public servant against the 1st appellant and the two cases were jointly tried together in the district court. The three appellants were convicted of robbery and sentenced to one year's imprisonment and the 1st appellant was also convicted of personating a public servant and sentenced to 6 months' imprisonment, the sentences to run concurrently. On appeal:—

Held: the district court in the circumstances had no jurisdiction to try the appellants jointly on these two charges and the trial was a nullity *ab initio*. As this technicality struck at the root of the jurisdiction of the district court to try the appellants, the appeal should be allowed and a new trial ordered.

William Crane's ⁽¹⁾ case followed. *Syed Ismail v. Public Prosecutor* ⁽⁴⁾ disapproved.

Cases referred to:—

- (1) *William Crane* 15 Cr. App. R. 23 and 183 at pp. 198 also 188; [1921] 2 A.C. 299 at p. 321.
- (2) *Albert Michael McDonnell* 20 Cr. App. R. 163.
- (3) *R. v. Dennis* and *R. v. Parker* 27 Cox C.C. 632; [1924] 1 K.B. 867.
- (4) *Syed Ismail v. Public Prosecutor* [1967] 2 M.L.J. 123.

The following cases were also cited in support of the contention that separate cases cannot be consolidated

A into one hearing: *Sandana* A.I.R. 1945 Lah. 286 and 292; *R. v. Assim* [1966] 3 W.L.R. 55; *Osman Mistry v. Abdul Krishnan* A.I.R. 1949 Cal. 632; *Najendra Nath* A.I.R. 1955 Cal. 555; *Champah Lal* A.I.R. 1941 Bom. 156.

MAGISTRATES' CRIMINAL APPEAL.

Freddy Yin for the 1st appellant.

B *Dato' David Marshall* for the 2nd and 3rd appellants.

Buttrose J.: The three appellants were convicted of robbery by the Criminal District Court and sentenced to 1 year's imprisonment.

C The 1st appellant was also convicted of personating a public servant by the same court and sentenced to 6 months' imprisonment to run concurrently with the sentence of 1 year on the robbery charge.

D This latter offence was committed at the same time and during the commission of the first offence of robbery.

E The case was devoid of all merit on the facts but it so happened that the charge of personating a public servant against the 1st appellant was made the subject of an entirely independent and separate charge on a separate charge sheet or as would be said in England of another indictment.

F The case of robbery against the three appellants was joined with the case of personating a public servant against the 1st appellant and the two cases were then jointly tried together. There was thus under the phraseology used under English law two indictments, one against the three appellants for robbery and one against the 1st appellant for personation of a public servant.

G No one seems to have been aware of this and the case proceeded as if there had been two counts in the one charge and there was a joint trial of both cases.

Section 161 of the Criminal Procedure Code (Cap. 132) provides that there shall be separate charges for distinct offences and every such charge shall be tried separately except as provided in sections 162, 163, 165 and 169.

H Sections 162, 163 and 165 make provisions for the joinder of charges and section 169 gives power to join persons. There appears to be no power to join cases or indictments.

I By virtue of the provisions of section 5 of the Criminal Procedure Code recourse must therefore be had to the law in force in England the application of which is mandatory.

The English authorities make it clear that that a simultaneous trial of two indictments or as here two cases is a nullity. See *William Crane*, ⁽¹⁾ *Albert Michael McDonnell*, ⁽²⁾ *R. v. Dennis* ⁽³⁾ and *R. v. Parker*. ⁽³⁾ Where an accused person has pleaded 'not guilty' to the